U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 19 2013 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims that it is a technology consulting business. It seeks to employ the beneficiary permanently in the United States as a software architect pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). Upon reviewing the petition, the director determined that the beneficiary did not qualify for the second preference classification and that the beneficiary did meet the job qualifications stated on the alien employment certification before the priority date.

On appeal, the petitioner asserts that it has submitted sufficient evidence to demonstrate that the beneficiary has the necessary years of job experience and qualifies for the position offered.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The petitioner submitted evidence of the beneficiary's education and job experience. The evidence shows that the beneficiary received a Bachelor's Degree in Engineering from on March 13, 1999. The issue in this case is whether the petitioner has established that the beneficiary also possesses six years of work experience as required by the labor certification before the May 10, 2004 priority date.

As noted above, the DOL certified the Form ETA 750 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The key to determining the job qualifications is found on Form ETA 750 Part 14. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the Form ETA 750 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien labor certification must involve reading and applying *the plain language* of the alien labor certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien labor certification.

Evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. If such evidence is unavailable, other documentation relating to the experience will be considered. 8 C.F.R. § 204.5(g)(1).

The evidence in the record establishes that the beneficiary possesses a foreign equivalent degree to a U.S. bachelor's degree. Therefore, the issue is whether there is sufficient evidence in the record to establish that the beneficiary has the required six years of work experience. To be eligible for approval, the beneficiary must have all the experience specified on the Form ETA 750 as of the petitioner's priority date. In this case, the priority date is May 10, 2004. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act.Reg.Comm.1977).[1]

[1] We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R.

In this matter, the Form ETA 750 at Part 14 stated the education requirements as: a master of science, engineering or equivalent degree or a master's degree in computer science, engineering or an equivalent degree. The petitioner also indicated that three years of experience in the job offered or three years of experience in a related occupation involving software engineering was required. The petitioner stated at Part 15 that in the alternative to the master's degree, it will "accept a BS and 6 years of experience or a PhD and one of experience in the job offered and/or in Related Occupations." On the Form ETA 750, at Part 13, the petitioner described the job duties in part as:

- Research, design, develop, and test operating systems-level software, compilers, and network distribution software for embedded real-time and enterprise applications, using Systems Applications Genesis Environment Tool (SAGE). Guide users in formulating systems level requirements; advise on alternate system architectures, and on the implications of new or revised computer systems/applications technology.

The petitioner specifically required at Part 15 of the Form ETA 750 that the beneficiary demonstrate one year of experience with each of SAGE Integration and SPI technologies and two years combined experience with embedded systems development methodologies and real-time operating systems frameworks including VxWorks, PSOS.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience he represented the following:

- That he was employed by [redacted] as a "software engineer" from September 9 [sic] to October 1999, and that his job duties consisted of "Software design, development and programming." He did not indicate the number of hours per week he worked at this job.

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§§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007, and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

- That he was employed by [redacted] as a "software/programmer analyst" from November 1999 to July 2000, and that his job duties consisted of "design, development and programming of software applications."

- That he was employed by [redacted] as a "principal engineer" from August 2003 to April 2005, and that his job duties consisted of "Software engineering and related tasks." Eleven months of this experience was after the priority date.

- That he was employed **by** [redacted] formerly known as [redacted] as a "technical architect" from May 2006 to the present, and that his job duties consisted of "support the development of complex real time commercial enterprise systems. Under minimal supervision, the position requires the planning and directing of development, installation, maintenance, and/or modification of mission-critical applications on large scale multi-user systems." However, because the beneficiary was not employed by the petitioner prior to the priority date, this job experience will not be considered further.

The petitioner submitted the following documents relevant to the beneficiary's employment history:

- A letter dated October 29, 1999 from the managing director of [redacted] who stated that the company employed the beneficiary as a "software engineer" from September 1998 to October 29, 1999. The declarant did not describe the beneficiary's job duties nor did he specify that the beneficiary was employed full-time.

- A letter dated February 1, 2010 from the managing director of [redacted] who stated that the company employed the beneficiary as a "software engineer" from May 4, 1998 to October 29, 1999, and that the beneficiary used skills in his project experience such as Visual Basic 5.0, MTS, Windows NT/95/98, COM, SQL Server and Oracle. The declarant also stated that the beneficiary learned languages such as C/C++, Assembly on real time operating systems like PSOS and VXWorks. Although the declarant described the beneficiary's skills, he did not describe the beneficiary's job duties at [redacted] In addition, the beneficiary indicated on the Form ETA 750 that he was not awarded his bachelor's degree in electrical engineering until March 1999. Finally, the letter does not indicate that the beneficiary was employed full-time. In fact, the letter only indicates that the beneficiary was "associated" with [redacted] not "employed." As the beneficiary had not yet graduated from university, the fact of full-time employment as a software engineer is called into question.

- A letter dated July 22, 2000 from the managing director of [redacted] who stated that the company employed the beneficiary as a "software programmer/analyst" from November 1999 to July 22, 2000. The letter did not

describe the beneficiary's job duties or indicate whether the beneficiary was employed full-time.

- A letter dated June 2, 2005 from the head of HR at [redacted] who stated that the company employed the beneficiary as "principal engineer" from August 11, 2003 to April 14, 2005. The declarant fails to specify the beneficiary's job duties or whether the beneficiary was employed full-time.

- A letter dated June 4, 2008 from [redacted] who stated that [redacted] employed the beneficiary as "principal engineer" from August 11, 2003 to April 14, 2005, and that the beneficiary worked with him on various software development projects. The declarant stated that the projects included the implementation of the embedded systems and real time operating systems using VXWorks and PSOS and application development using SAGE Integration and SPI workflow technologies. The co-worker did not indicate that he was the beneficiary's superior or how he obtained knowledge of the beneficiary's specific job duties. In addition, the co-worker failed to indicate whether the beneficiary's employment was full-time. Also, about 11 months of this experience was after the priority date.

- A letter dated June 1, 2009 from the president and CEO of [redacted] who stated that the company employed the beneficiary from May 1, 2006 to October 15, 2006 as a "software engineer." This experience is after the priority date.

- A letter dated April 30, 2006 from a human resources representative of [redacted] who stated that the company employed the beneficiary as a "software programmer/analyst" from March 2, 2005 to April 30, 2006. This experience is after the priority date.

The petitioner also submitted the following documents:

- A letter dated December 16, 2010 from [redacted] who stated that he was employed by [redacted] as a software engineer from April 15, 1998 to December 10, 1999. The declarant also stated that the beneficiary worked as a "software engineer" from May 4, 1998 to October 29, 1999, and that the beneficiary worked on projects that involved technologies such as Visual Basic 5.0, MTS, Windows NT/95/98, COM, SQL Server and Oracle. The declarant also stated that the beneficiary executed projects using C/C++, Assembly languages on real time operating systems like PSOS and VXWorks technologies. The co-worker did not indicate that he was the beneficiary's superior or how he obtained specific knowledge of the beneficiary's job duties. It is also noted that the declarant's statement is inconsistent with other statements made concerning the beneficiary's employment with [redacted] The declarant states that the

employer is out-of-business and that the beneficiary cannot get "additional documents." However, the petitioner did submit an letter from 2010.

- A memo dated December 5, 2003 from human resource department that stated the beneficiary was employed as a "senior software engineer" from August 3, 2000 to September 8, 2003. The declarant did not describe the beneficiary's job duties. The beneficiary did not list on the Form ETA 750 as one of his former employers.

- A letter dated December 5, 2003 from the human resources representative of who stated that the company has accepted the beneficiary's resignation and that he would be relieved of his duties effective September 8, 2003. The declarant did not describe the beneficiary's job duties. The beneficiary did not list on the Form ETA 750 as one of his former employers.

- A letter dated June 5, 2008 from who stated that the beneficiary worked for as a "senior software engineer" from August 1, 2000 to September 8, 2003 in software engineering projects with the declarant, and the software engineering implementation included the embedded system and real time operating systems, networking systems using C/C++, Assembly Language, VXWorks and PSOS. The co-worker did not indicate that he was the beneficiary's superior nor did he describe the beneficiary's job duties. The beneficiary did not list on the Form ETA 750 as one of his former employers.

- A letter dated February 2, 2010, from a human resources representative of who stated that the company employed the beneficiary as software programmer/analyst from March 2, 2005 to April 30, 2006. This experience is after the priority date.

On appeal, counsel asserts that the documentation submitted by the petitioner is sufficient evidence to demonstrate that the beneficiary had the required job experience before the priority date of May 10, 2004.

As noted above, evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, other documentation relating to the experience will be considered. *Id.* In this matter, the beneficiary claims to be qualified for the offered job because he had at least six years of work experience. Here, the petitioner did not indicate on the Form ETA 750 that the beneficiary was employed by Furthermore, the information provided in the employment statements conflict with the beneficiary's statements on the Form ETA 750 with respect to the beneficiary's job experience. There has been no explanation given for the multiple

inconsistencies and contradictions found in the record. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The declarants in many of the employment letters failed to describe the beneficiary's job duties. In addition, many of the employment letters are not from a former employer as required by 8 C.F.R. § 204.5(g)(1). Furthermore, there is insufficient evidence in the record to demonstrate that the beneficiary had obtained the specific experience required at Part 15 of the Form ETA 750 prior to the priority date. Regardless, even if the AAO were to consider the letters from former co-workers, these letters fail to specifically describe the beneficiary's job duties during his years of purported employment. Overall, the employment letters are inconsistent, contradictory, and vague and can be afforded little weight in establishing the beneficiary's work experience. They do not represent six years of full-time work experience in the required positions before the May 10, 2004 priority date.

Therefore, it has not been established that the beneficiary has six years of work experience (five of which must be progressive, post-baccalaureate experience) and, thus, he does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification; that the beneficiary has either (1) a U.S. degree above a baccalaureate (master's degree, etc.) or a foreign equivalent degree or (2) a U.S. baccalaureate degree or foreign equivalent degree and six years of experience.

For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145.

Beyond the decision of the director, the USCIS records show that the petitioner has filed other immigrant petitions; and therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even

if the instant record established the petitioner's ability to pay the proffered wage for the instant beneficiary, the fact that there are multiple petitions would further call into question the petitioner's eligibility for the benefit sought.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.